

**REGISTRAR'S SUBMISSION PACKAGE**

**BOARD OF FUNERAL DIRECTORS AND EMBALMERS  
18 VAC 65-20-10 et seq.**

**Analysis of Proposed Amendments to Regulation**

**1. Basis of Regulation:**

Title 54.1, Chapter 24 and Chapter 28 of the Code of Virginia provide the basis for these regulations.

Chapter 24 establishes the general powers and duties of health regulatory boards including the power to establish qualifications for licensure and responsibility to promulgate regulations.

§ 54.1-2800 establishes the definitions necessary for the regulation of crematory services, and §§ 54.1-2818.1 through 54.1-2818.3 establish the prerequisites for cremation and the authority for the board to register crematories.

**2. Statement of Purpose:**

The purpose is to amend regulations pursuant to changes in the Code of Virginia made in Chapter 867 of the 1998 Acts of the Assembly which required the Board to promulgate regulations for the registration of crematories. In accordance with the fourth enactment clause, the Board promulgated emergency regulations which became effective on February 2, 1999. These proposed regulations replace the emergency regulations and are intended to establish a renewal fee and registration schedule for crematories. The proposed regulations also specify that a crematory providing services directly to the public must be licensed as a funeral service establishment or a branch of an establishment in order to ensure public safety and protection.

**3. Substance of Regulations:**

**18 VAC 65-20-70. Initial fees.**

The fee for registration of a crematory is established at \$100; the renewal of a crematory registration is established at \$100, payable by January 31<sup>st</sup> of each year.

The reinstatement fee for a crematory that has allowed its registration to lapse is \$50 for up to 3 years following expiration.

**18 VAC 65-20-120 Expiration dates.**

The expiration date is established as January 31<sup>st</sup> of each calendar year.

**18 VAC 65-20-130. Renewal of license; registration.**

The crematory is added to the listing of persons or entities that must renew according to provisions of this section.

**18 VAC 65-20-435. Registration of crematories.**

This section establishes the requirement for a person intending to own or operate a crematory to register with the Board at least 30 days prior to opening. It also specifies that an entity providing cremation services directly to the public must be licensed as a funeral service establishment or be a branch of such establishment. This references the current requirement for licensing of funeral establishments.

**4. Issues of the Regulations**

**ISSUE 1: Establishment of a fee and schedule for renewal of crematory registration.**

The third enactment clause of HB 1078 provided that any crematory's valid and current registration with the Division of Vital Records of the Board of Health was automatically transferred to the Board of Funeral Directors and Embalmers, which was authorized to promulgate emergency regulations for the implementation of the act. In its consideration of a fee for initial registration or renewal for a crematory, it was determined that fees should be equal to those currently charged to another entity registered by the Board – a courtesy care holder. The two entities are similar in that they provide limited rather than full services in the funeral industry and therefore, pay registration or renewal fees of \$100 versus the \$225 charged to a funeral service establishment. The reinstatement fee of \$50 per year is the same for any license or registration that has expired.

**Advantage or disadvantages**

For a crematory seeking initial registration or renewal of registration, the \$100 per year fee should not present a barrier to doing business. Other licensees or registrants of the Board pay hire fees ranging from \$150 for an individual's license to practice funeral services to \$250 for a surface transportation and removal service registration.

There are no advantages or disadvantages to the public; the registration fee should not have any affect on the availability of cremation services to people in Virginia.

**ISSUE 2: Establishment of requirements for registration.**

The statutory mandate for registration of crematories does authorize the Board of Funeral Directors and Embalmers to establish criteria for or to require inspections of the facilities. There are certain prerequisites for cremations set forth in the Code of Virginia and there are federal regulations which must be followed (such as OSHA rules), but the Board cannot place conditions on the registration of a crematory such as it would on the licensure of a funeral service establishment. Therefore, the only requirement stipulated is that someone intending to open a crematory must apply for registration at least 30 days in advance of opening.

With the advice of the Assistant Attorney General, the Board has interpreted the practice of cremation in which the crematory deals directly with the public as the “practice of funeral services” as defined in § 54.1-2800 of the Code of Virginia. In the proposed regulation, the Board has so specified that a crematory providing services directly to the public must also be licensed as a funeral service establishment or a branch of an establishment.

### **Advantages and disadvantages**

Since the majority of cremation services are performed under contract with a licensed funeral service establishment, the public is protected by the extensive laws and regulations governing disclosures, pricing, sales of pre-need packages, facility standards, and infection control. If a crematory is dealing directly with the public, it is required to hold a license and follow those same laws and regulations. While that may be burdensome to the crematory, it does provide some protection and security to persons who may be vulnerable at the time of a death.

## **5. Estimated Fiscal Impact of the Regulations**

### **I. Fiscal Impact Prepared by the Agency:**

#### **Number of entities affected by this regulation:**

There are 41 entities that have registered with the Board as crematories in Virginia.

#### **Projected cost to the agency:**

The agency will incur some costs (less than \$2000) for mailings to the Public Participation Guidelines Mailing List, conducting a public hearing, and sending copies of final regulations to regulated entities. Every effort will be made to incorporate those into anticipated mailings and board meetings already scheduled.

There may be some on-going costs associated with disciplinary cases related to crematories. Since the date of initial registration, July 1, 1998, there have been two cases opened – both related to registered crematories doing business directly with the public in violation of law and regulation. While there are no regulatory requirements for cremations, the Board would anticipate a minimal number of reported violations of law related to crematory

practices. If the caseload continues to be 2 to 3 per year, the anticipated disciplinary cost to the Board would range from \$1000 to \$6000, depending on the level of investigative work required, the stage at which an outcome is determined (no violation, pre-hearing consent order, informal conference, formal hearing, etc.).

**Projected costs to the affected entities:**

Crematories that provide cremation services under a contract with a funeral establishment have been registered with the Department of Health. That registration has been transferred to the Board of Funeral Directors and Embalmers, which has set the fee for initial registration and renewal of \$100 per year. If a crematory allows that registration to lapse, the facility that wants to reinstate its registration would pay an additional \$50 per year for each year in the registration was lapsed.

**Citizen input in development of regulation:**

In the development of emergency and proposed regulations, notices were sent to persons on the public participation guidelines mailing list of meetings. Emergency regulations were also sent to all entities that had been registered with the Board of Health as crematories. A Notice of Intended Regulatory Action was sent to persons on the PPG list, but no comment was received on the NOIRA. Public comment was also received at each meeting.

**Localities affected:**

There are no localities affected by these regulations in the Commonwealth.

**II. Fiscal Impact Prepared by the Department of Planning and Budget:**

(To be attached)

**III. Agency Response:**

**c. Source of the legal authority to promulgate the contemplated regulation.**

**18 VAC 65-20-10 et seq. Regulations of the Board of Funeral Directors & Embalmers** was promulgated under the general authority of Title 54.1 of the Code of Virginia.

**Chapter 24** establishes the general powers and duties of health regulatory boards including the responsibility to promulgate regulations, levy fees, administer a licensure and renewal program, and discipline regulated professionals.

*§ 54.1-2400. General powers and duties of health regulatory boards.--The general powers and duties of health regulatory boards shall be:*

- 1. To establish the qualifications for registration, certification or licensure in accordance with the applicable law which are necessary to ensure competence and integrity to engage in the regulated professions.*
- 2. To examine or cause to be examined applicants for certification or licensure. Unless otherwise required by law, examinations shall be administered in writing or shall be a demonstration of manual skills.*
- 3. To register, certify or license qualified applicants as practitioners of the particular profession or professions regulated by such board.*
- 4. To establish schedules for renewals of registration, certification and licensure.*
- 5. To levy and collect fees for application processing, examination, registration, certification or licensure and renewal that are sufficient to cover all expenses for the administration and operation of the Department of Health Professions, the Board of Health Professions and the health regulatory boards.*
- 6. To promulgate regulations in accordance with the Administrative Process Act (§ 9-6.14:1 et seq.) which are reasonable and necessary to administer effectively the regulatory system. Such regulations shall not conflict with the purposes and intent of this chapter or of Chapter 1 and Chapter 25 of this title.*
- 7. To revoke, suspend, restrict, or refuse to issue or renew a registration, certificate or license which such board has authority to issue for causes enumerated in applicable law and regulations.*
- 8. To appoint designees from their membership or immediate staff to coordinate with the Intervention Program Committee and to implement, as is necessary, the provisions of Chapter 25.1 (§ 54.1-2515 et seq.) of this title. Each health regulatory board shall appoint one such designee.*
- 9. To take appropriate disciplinary action for violations of applicable law and regulations.*

10. *To appoint a special conference committee, composed of not less than two members of a health regulatory board, to act in accordance with § 9-6.14:11 upon receipt of information that a practitioner of the appropriate board may be subject to disciplinary action. The special conference committee may (i) exonerate the practitioner; (ii) reinstate the practitioner; (iii) place the practitioner on probation with such terms as it may deem appropriate; (iv) reprimand the practitioner; (v) modify a previous order; and (vi) impose a monetary penalty pursuant to § 54.1-2401. The order of the special conference committee shall become final thirty days after service of the order unless a written request to the board for a hearing is received within such time. If service of the decision to a party is accomplished by mail, three days shall be added to the thirty-day period. Upon receiving a timely written request for a hearing, the board or a panel of the board shall then proceed with a hearing as provided in § 9-6.14:12, and the action of the committee shall be vacated. This subdivision shall not be construed to affect the authority or procedures of the Boards of Medicine and Nursing pursuant to §§ 54.1-2919 and 54.1-3010.*
  
11. *To convene, at their discretion, a panel consisting of at least five board members or, if a quorum of the board is less than five members, consisting of a quorum of the members to conduct formal proceedings pursuant to § 9-6.14:12, decide the case, and issue a final agency case decision. Any decision rendered by majority vote of such panel shall have the same effect as if made by the full board and shall be subject to court review in accordance with the Administrative Process Act. No member who participates in an informal proceeding conducted in accordance with § 9-6.14:11 shall serve on a panel conducting formal proceedings pursuant to § 9-6.14:12 to consider the same matter.*
  
12. *To issue inactive licenses and certificates and promulgate regulations to carry out such purpose. Such regulations shall include, but not be limited to, the qualifications, renewal fees, and conditions for reactivation of such licenses or certificates.*

In addition to provisions in § 54.1-2400 that authorize the Board to promulgate regulations and to set fees and schedules for renewals, the Code provides prerequisites and a mandate for registration of crematories in:

**§ 54.1-2800. Definitions.**

*As used in this chapter, unless the context requires a different meaning:*

*"Advertisement" means any information disseminated or placed before the public.*

*"At-need" means at the time of death or while death is imminent.*

*"Board" means the Board of Funeral Directors and Embalmers.*

*"Cremate" means to reduce a dead human body to ashes and bone fragments by the action of fire.*

*"Cremator" means a person or establishment that owns or operates a crematory or crematorium or cremates dead human bodies.*

*"Crematory" or "crematorium" means a facility containing a furnace for cremation of dead human bodies.*

*"Embalmer" means any person engaged in the practice of embalming.*

*"Embalming" means the preservation and disinfection of the human dead by external or internal application of chemicals.*

*"Funeral directing" means the for-profit profession of directing or supervising funerals, preparing human dead for burial by means other than embalming, or making arrangements for funeral services or the financing of funeral services.*

*"Funeral director" means any person engaged in the practice of funeral directing.*

*"Funeral service establishment" means any main establishment, branch or chapel which is permanently affixed to the real estate and for which a certificate of occupancy has been issued by the local building official where any part of the profession of funeral directing or the act of embalming is performed.*

*"Funeral service licensee" means a person who is licensed in the practice of funeral services.*

*"In-person communication" means face-to-face communication and telephonic communication.*

*"Next of kin" means any of the following persons, regardless of the relationship to the decedent: any person designated to make arrangements for the disposition of the decedent's remains upon his death pursuant to § 54.1-2825, the legal spouse, child over eighteen years of age, custodial parent, noncustodial parent, siblings over eighteen years of age, guardian of minor child, guardian of minor siblings, maternal grandparents, paternal grandparents, maternal siblings over eighteen years of age and paternal siblings over eighteen years of age, or any other relative in the descending order of blood relationship.*

*"Practice of funeral services" means engaging in the care and disposition of the human dead, the preparation of the human dead for the funeral service, burial or cremation, the making of arrangements for the funeral service or for the financing of the funeral service and the selling or making of financial arrangements for the sale of funeral supplies to the public.*

*"Preneed" means at any time other than at-need.*

*"Preneed funeral contract" means any agreement where payment is made by the consumer prior to the receipt of services or supplies contracted for, which evidences arrangements prior to death for: (i) the providing of funeral services or (ii) the sale of funeral supplies.*

*"Preneed funeral planning" means the making of arrangements prior to death for: (i) the providing of funeral services or (ii) the sale of funeral supplies.*

*"Resident trainee" means a person who is preparing to be licensed for the practice of funeral services under the direct supervision of a practitioner licensed by the Board.*

*"Solicitation" means initiating contact with consumers with the intent of influencing their selection of a funeral plan or funeral service provider.*

#### **§ 54.1-2818.1. Prerequisites for cremation.**

*No dead human body shall be cremated without (i) permission of the medical examiner as required by § 32.1-284 and either (ii) visual identification of the deceased by the next-of-kin or his representative, who may be any person designated to make arrangements for the decedent's burial or the disposition of his remains pursuant to § 54.1-2825 or an agent named in an advance directive pursuant to § 54.1-2984 or (iii) a twenty-four-hour waiting period between the time of death and the cremation.*

#### **§ 54.1-2818.2. Inapplicability to officers of state and local institutions.**

*Nothing in this article shall be applicable to any officer of any institution operated by the Commonwealth or by any county, city or town in the performance of his duties as such.*

#### **§ 54.1-2818.3. Applications for registration required.**

*Any crematory shall apply for and receive a registration from the Board as a registered crematory.*

## **Amendments to Chapter 28 of Title 54.1**

The proposed regulations are being promulgated to comply with statutory provisions of House Bill 1078 (Chapter 867) of the 1998 General Assembly. These regulations are being promulgated as replacement for the Emergency Regulations mandated by the fourth enactment clause, which required the Board of Funeral Directors and Embalmers to promulgate regulations to implement the act to be effective within 280 days of the enactment. (See attached copy of Chapter 867)

### **d. Letter of assurance from the office of the Attorney General.**

See attached.

### **e. Summary of Public Comment received in response to the Notice of Intended Regulatory Action.**

The Notice of Intended Regulatory Action was published on February 15, 1999 and subsequently sent to the Public Participation Guidelines Mailing List of the Board; there was no comment received.

### **f. Changes to existing regulations. (*The proposed regulations are identical to emergency regulations that went into effect on February 2, 1999*)**

#### **18 VAC 65-20-70. Initial fees.**

The fee for registration of a crematory is established at \$100; the renewal of a crematory registration is established at \$100, payable by January 31<sup>st</sup> of each year.

The reinstatement fee for a crematory which has allowed its registration to lapse is \$50 for up to 3 years following expiration.

#### **18 VAC 65-20-120 Expiration dates.**

The expiration date is established as January 31<sup>st</sup> of each calendar year.

#### **18 VAC 65-20-130. Renewal of license; registration.**

The crematory is added to the listing of persons or entities which must renew according to provisions of this section.

#### **18 VAC 65-20-435. Registration of crematories.**

This section establishes the requirement for a person intending to own or operate a crematory to register with the Board at least 30 days prior to opening. It also specifies that an entity providing cremation services directly to the public must be licensed as a funeral service establishment or be a branch of such establishment. This references the current requirement for licensing of funeral establishments.

**g. Statement of reasoning for the regulations.**

Promulgation of the amendments to 18 VAC 65-20-10 et seq. is necessary to conform to statutory provisions of Chapter 867 of the 1998 Acts of the Assembly. The proposed regulations are promulgated by the Board to provide the **fees and a renewal schedule** necessary for operation of a program of registration of crematories, as the agency is required by statute to derive all funds from fees charged to its regulated entities. The statute stipulates only the registration of crematories; the statute authorizes no other requirements, such as inspections or reporting of numbers of cremations.

There are certain prerequisites for cremations set forth in the Code of Virginia and there are federal rules which must be followed (such as OSHA), but the Board cannot place conditions on the registration of a crematory such as it would on the licensure of a funeral service establishment. Therefore, the only requirement stipulated is that someone intending to open a crematory must apply for registration at least 30 days in advance of opening.

With the advice of the Assistant Attorney General, the Board has interpreted the practice of cremation in which the crematory deals directly with the public as the “practice of funeral services” as defined in § 54.1-2800 of the Code of Virginia. In the proposed regulation, the Board has so specified that a crematory providing services directly to the public must also be licensed as a funeral service establishment or a branch of an establishment.

**h. Statement on alternatives considered.**

The Board did not consider alternatives to the promulgation of regulations as it was mandated to do so by the statute. It did consider and adopt the least burdensome regulation consistent with the specific provisions of the statutes and with its concern for public health and safety.

The fees established by the Board for the registration of crematories are consistent with those charged to a courtesy card holder, but are less than the registration fee of a surface transportation and removal service or the licensure fee of a funeral service establishment. For a crematory seeking initial registration or renewal of registration, the \$100 per year fee would present a barrier to doing business. Other licensees or registrants of the Board pay hire fees ranging from \$150 for an individual’s license to practice funeral services to \$250 for a surface transportation and removal service registration.

The regulation in 18 VAC 65-20-435, which specifies that a crematory providing cremation services **directly to the public** must also be licensed as a funeral service establishment or a branch of an establishment, is provided as a clarification of the statute defining the “practice of funeral services” as “engaging in the care and disposition of the human dead, the preparation of the human dead for the funeral service, burial or cremation, the making of arrangements for the funeral service or for the financing of the funeral service and the selling or making of financial arrangements for the sale of funeral supplies to the public.”

While there has been some opposition expressed to that provision of the regulation, it is the opinion of the Board’s counsel that the Board has interpreted the statutory definition correctly. If a crematory provides its services directly to the public (as opposed to providing contract services to a funeral service establishment), such crematory is functioning as a funeral establishment and must be so licensed.

Since the majority of cremation services are performed under contract with a licensed funeral service establishment, the public is protected by the extensive laws and regulations governing disclosures, pricing, sales of pre-need packages, facility standards, and infection control. If a crematory is dealing directly with the public, it is required to hold a license and to follow those same laws and regulations. While that may be burdensome to the crematory, it does provide some protection and security to persons who may be vulnerable at the time of a death.

**i. Statement of clarity.**

Prior to the adoption of emergency regulations by the Board, an ad hoc advisory committee comprised on persons who own crematories, representatives of crematory and funeral service associations, a staff person from the Division of Vital Records, and members of the Board discussed the changes in open session. The clarity and reasonableness of the language which was adopted had the approval of persons on the ad hoc committee, the Assistant Attorney General who worked with the committee in drafting regulatory language, and members of the Board.

**j. Schedule for review of regulation.**

The proposed amendments to these regulations will be reviewed following publication in the Register and the 60-day public comment period. If there are any oral or written comments received, the Board will consider revisions to the proposal prior to adoption of final regulations.

Public Participation Guidelines of the Board of Funeral Directors and Embalmers (18 VAC 65-10-10 et seq.) require a thorough review of regulations each biennium. Therefore, the Board will review this set of regulations in 2001 and will bring any recommended amended regulations to the full board for consideration.

In addition, the Board receives public comment at each of its meetings and will consider any request for amendments. Petitions for rule-making also receive a response from the Board during the mandatory 180 days in accordance with its Public Participation Guidelines.

#### **k. Anticipated Regulatory Impact**

##### **Projected cost to the state to implement and enforce:**

(i) Fund source: As a special fund agency, the Board of Funeral Directors and Embalmers must generate sufficient revenue to cover its expenditures from non-general funds, specifically the renewal and application fees it charges to practitioners for necessary functions of regulation.

(ii) Budget activity by program or subprogram: There is no change required in the budget of the Commonwealth as a result of this program.

(iii) One-time versus ongoing expenditures: The agency will incur some costs (less than \$2000) for mailings to the Public Participation Guidelines Mailing List, conducting a public hearing, and sending copies of final regulations to regulated entities. Every effort will be made to incorporate those into anticipated mailings and board meetings already scheduled.

There may be some on-going costs associated with disciplinary cases related to crematories. Since the date of initial registration, July 1, 1998, there have been two cases opened – both related to registered crematories doing business directly with the public in violation of law and regulation. While there are no regulatory requirements for cremations, the Board would anticipate a minimal number of reported violations of law related to crematory practices. If the caseload continues to be 2 to 3 per year, the anticipated disciplinary cost to the Board would range from \$1000 to \$6000, depending on the level of investigative work required, the stage at which the an outcome is determined (no violation, pre-hearing consent order, informal conference, formal hearing, etc.).

##### **Projected cost on localities:**

There is no projected cost to localities.

##### **Description of entities that are likely to be affected by regulation:**

The entities that are likely to be affected by these regulations would be registered crematories.

##### **Estimate of number of entities to be affected:**

There are 41 entities that have registered with the Board as crematories in Virginia. If a crematory is performing its services under contract with a funeral service establishment and not directly serving the public, its cost would be \$100 per year for registration. If it is making arrangements and accepting cremations directly from the public, it must also be licensed as a funeral service establishment at a cost of \$225 per year.